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No. 99-___

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In The

Supreme Court of the United States

KATHRYN I. BLANKENSHIP,

Petitioner,

v.

The Honorable ALAN A. McDONALD,
United States District Court Judge, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a nonparty witness who appears and testifies "in any court of the United States" have a cause of action under 42 U.S.C. § 1985(2) against persons "who conspire . . . to injure such party or witness in his person or property on account of his having so attended or testified"?

2. By excluding judicial branch employees from the provisions of the Civil Service Reform Act which allow employees to obtain administrative or judicial review of adverse personnel actions, did Congress intend to preclude such an employee from bringing a *Bivens* action to challenge a termination motivated by a desire to retaliate against the employee for having given truthful testimony about her judicial employer?

3. Is the ability to file an EEO complaint with the local District Court's EEO Coordinator, combined with the Back Pay Act, a constitutionally adequate remedy for an unconstitutional job termination where the persons who will decide how to dispose of the EEO complaint are the same persons who terminated the complainant?

4. Does the Constitution itself require a judicially fashioned damages remedy in the absence of any other remedy to vindicate the violation of an underlying constitutional right, or may judicial branch employees simply be left with no remedy whatsoever for redress of the deliberate violation of their constitutional rights?

PARTIES TO THE PROCEEDINGS

Petitioner, the plaintiff/appellant below, is Kathryn I. Blankenship. The respondents, defendants below, are The Honorable Alan A. McDonald, United States District Court Judge for the Eastern District of Washington, and his marital community; and James R. Larsen, Clerk of the United States District Court for the Eastern District of Washington, and his marital community.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Kathryn I. Blankenship, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

On May 14, 1999 the United States Court of Appeals for the Ninth Circuit affirmed the dismissal of petitioner's suit against District Court Judge Alan A. McDonald and District Court Clerk James Larsen. *Blankenship v. McDonald*, 176 F.3d 1192 (9th Cir. 1999). The opinion appears as Appendix A to this petition.

JURISDICTION

Petitioner's petition for rehearing was denied by the Court of Appeals on July 22, 1999. A copy of this order appears as Appendix B to this petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. Section 1985 provides in pertinent part:

> If two or more persons in any State or territory conspire to deter by force, intimidation, or threat, *any party or witness* in any court of the United States from attending such court, or from

> testifying truthfully, or *to injure such party or witness* in his person or property *on account of his having so attended or testified*, or to influence the verdict, presentment or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; . . .
>
> [I]n any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, *whereby another is injured* in his person or property, or deprived of having and exercising any privilege of a citizen of the United States, *the party so injured or deprived may have an action* for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

(Italics added).

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . . .

STATEMENT OF THE CASE

Kathryn I. Blankenship filed suit against defendants, District Court Judge Alan A. McDonald and Court Clerk James R. Larsen in their individual capacities. Her suit was dismissed for failure to state a claim upon which relief could be granted. *Blankenship*, 176 F.3d at 1195.

Accordingly, the allegations of her complaint were considered true by the Court of Appeals. *Id.* at 1194.

Blankenship was appointed as a court reporter for the United States District Court for the Eastern District of Washington in 1985. *Id.* From 1985 to 1990 she worked in Spokane, Washington, and then in 1990 she was transferred to Yakima, Washington where she worked as the official court reporter for Judge McDonald. *Id.* James Larsen was the Clerk of the District Court, and he supervised the court reporters in Spokane and Yakima. *Id.* Larsen is also the Equal Employment Opportunity ("EEO") Coordinator for the Court.

On July 24, 1994 an EEO hearing was held before the Chief Judge of the District Court to consider the complaint of deputy clerk Christie Mearns. (ER 5-6). Mearns alleged gender discrimination in her employment as a deputy clerk at the Yakima federal courthouse. (ER 5-6). Blankenship was subpoenaed by Mearns' attorney to testify at the Mearns' grievance hearing. *Blankenship*, at 1194. The Chief Judge of the District Court presided at the Mearns EEO hearing.

Blankenship expressed her fear that she would be fired if she were required to testify; however, after she was assured by the Chief Judge that her testimony would be confidential, and that she would not be retaliated against for testifying, she did so. (ER 6). In her sworn testimony she attested to facts in support of Mearns' claim of discrimination. She testified to Judge McDonald's conduct "which included abuse of personnel rules, use of court facilities for private business, regular

and excessive profanity, and sexist and racist jokes and comments." *Blankenship*, at 1194.

She also disclosed facts concerning numerous acts of misconduct by Judge McDonald. (ER 7-9); *Blankenship*, at 1194. She testified that Judge McDonald had required her to certify under oath that her official court transcripts were true and correct verbatim transcripts even though the judge had changed and edited them, and that he would not allow her to certify them "as amended." (ER 7); *Blankenship*, at 1194. She further testified that Judge McDonald required her to generate false and unauthorized reimbursement requests; to conceal information from a government audit; to notarize false signatures and to make false signatures and to participate in the creation of false documents; and to do personal errands and private business work for him while at the courthouse and elsewhere on federal employment time. (ER 8).

Following the Mearns hearing, Clerk Larsen, who was present for Blankenship's testimony, was observed talking with Judge McDonald. *Blankenship*, at 1194. The next working day when Blankenship first saw Judge McDonald he threatened and intimidated her in a physically hostile and aggressive manner, stating that nothing would stand between him and senior status, and accused her of having "aired the court's dirty laundry." *Id.* (ER 9-10). He told her she would no longer be able to keep her job, and he reminded her of what had happened to attorney Jay Sandlin who had crossed him. (ER 10). *See United States District Court v. Sandlin*, 12 F.3d 861 (9th Cir. 1993).

Thereafter Clerk Larsen told Blankenship that she had betrayed and been disloyal to Judge McDonald, and that she could no longer work at the Yakima courthouse. (ER 10-11). He told her she had three options: (1) to take a voluntary transfer to Spokane to be part of a pool of court reporters; (2) to take permanent medical disability; or (3) to be terminated for poor performance due to a delay in filing a recent transcript. *Blankenship*, at 1194. Blankenship refused to elect any of these options. *Id.* After Blankenship refused to accept a "voluntary" transfer to Spokane, she received a poor performance review in the mail on November 22, 1994. (ER 12-13); *Blankenship*, at 1194. In her previous ten years of service as an Official Court Reporter Blankenship had never received a written performance review. (ER 12).

Larsen informed Blankenship that effective February 1, 1995 she was to be demoted and transferred to the Spokane federal courthouse where she would never be seen by Judge McDonald. *Blankenship*, at 1194. Blankenship refused to be transferred to Spokane. *Id.* On February 1, 1995 Larsen informed Blankenship that he was recommending that she be fired. *Id.* Blankenship responded in writing that the stated grounds for her termination were pretextual. *Id.* By letter dated February 13, 1995 Blankenship was informed that effective March 3, 1995 she was fired. *Id.* at 1194-95. The order firing her was signed by the four active district court judges, including Judge McDonald and the Chief Judge who had presided over the Mearns EEO hearing. *Id.* at 1195; (ER 14).

In her complaint Blankenship alleged a claim under 42 U.S.C. Section 1985(2). That statute provides that a

person who testifies "in any court of the United States" has a cause of action against persons "who conspire . . . to injure such party *or witness* in his person or property on account of his having so attended or testified . . . ." The Court of Appeals affirmed the dismissal of this claim holding that nonparty witnesses do not have a cause of action under this statute. *Blankenship*, at 1196. Holding that only litigants have a cause of action under this statute, the Court concluded that "[b]ecause Blankenship was not a party to the EEO proceeding, she can show no injury under Section 1985(2)." *Id.* The Court of Appeals relied upon its earlier decision in *David v. United States*, 820 F.2d 1038, 1043 (9th Cir. 1987), which held that nonparty witnesses have no cause of action.

Blankenship also brought a *Bivens*[1] claim against McDonald and Larsen, contending that they had conspired to punish her for testifying truthfully, thereby violating her First Amendment right to freedom of speech. The District Court dismissed Blankenship's *Bivens* claim on the ground that Congress had precluded judicial branch employees from bringing such claims. Under the Civil Service Reform Act ("CSRA") court reporters are classified as "excepted service" employees. (ER 202). "Excepted service" employees of the judicial branch have no statutory right to administrative or judicial review of adverse personnel decisions. However, the District Court noted that judicial branch employees can

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[1] A "*Bivens* action" is the commonly used phrase which describes a judicially created remedy for unconstitutional conduct by federal officials. *See Bivens v. Six Unknown Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

file EEO complaints under the local District Court's EEO plan. "The Eastern District's EEO Plan allows an employee to bring a discrimination complaint if the employee has been retaliated against for 'serv[ing] as a . . . witness . . . in connection with a complaint." (ER 204). Such EEO complaints are initially handled by the EEO Coordinator (in this case defendant Larsen), and if the complainant objects to the Coordinator's recommended disposition of the complaint, a review hearing may be held before the Chief Judge of the District Court. (ER 204). An employee who prevails on an EEO discrimination complaint may not recover damages. However, the District Court noted that "the Back Pay Act allows judicial employees to receive back pay for adverse personnel actions determined by the 'appropriate authority' to have been 'unjustified or unwarranted.' " (ER 204). The District Court concluded that Congress intended for judicial branch employees to have no other remedy for retaliation for having testified beyond the remedy afforded by the combination of the EEO Plan for the local District Court and the Back Pay Act. (ER 206).

> I recognize that the remedies available to plaintiff are incomplete compared to those that would be available in a *Bivens* action. Under the EEO Plan, the Chief Judge's decision on a discrimination complaint apears to be final, and the EEO coordinator's decision is not necessarily reviewable at a formal hearing. [Citation]. Nevertheless, because Congress's failure to provide more complete remedies was not inadvertent, no *Bivens* action is available to plaintiff.

(ER 206).

The Ninth Circuit affirmed the District Court's dismissal. Without describing or indicating what Blankenship's nonjudicial remedies were, the Court of Appeals simply stated that Blankenship had some "incomplete" remedy – presumably the combination of the Back Pay Act and the EEO grievance procedure that the District Court premised its ruling upon – and that "the lack of more complete remedies was not inadvertent." *Blankenship*, 176 F.3d at 1195. Finding that Congress' decision not to afford "excepted service" judicial branch employees the right to administrative or judicial review of adverse personnel decisions remedies was "not inadvertent," the Court of Appeals concluded "that the CSRA precludes a *Bivens* remedy in this case." *Id.*

Blankenship contended that even assuming Congress intended to preclude any *Bivens* action, that it would be unconstitutional to leave judicial branch employees without any remedy whatsoever for the deliberate violation of their constitutional rights. The Court of Appeals did not address this argument directly, and by its silence, impliedly rejected it.

REASONS FOR GRANTING THE WRIT

A. THE DECISION BELOW CONFLICTS WITH TWO DECISIONS OF THE TENTH CIRCUIT.

The Ninth Circuit's decision that a nonparty witness does not have a cause of action under 42 U.S.C. § 1985 is in direct conflict with two decisions of the Tenth Circuit, *Brever v. Rockwell International Corp.*, 40 F.3d 1119 (10th Cir. 1994) and *Langley v. Adams County, Colorado*, 987 F.2d

1473 (10th Cir. 1993).[2] It is also in conflict with a thoughtful District Court decision in *Gerakis v. Champagne*, 913 F.Supp. 646 (D.Mass. 1996), and with District Court decisions from the Third and Fifth Circuits.[3] These courts have held that a nonparty witness does have a cause of action under 42 U.S.C. § 1985. On the other hand the Seventh Circuit has adopted the position taken by the Ninth Circuit. *Rylewicz v. Beaton Services*, 888 F.2d 1175, 1180 (7th Cir. 1989). The issue was recently noted by this Court, but the question was left to the lower courts to resolve on remand. *Haddle v. Garrison*, 525 U.S. 121, 119 S.Ct. 489, 491, n.3, 142 L.Ed.2d 502 (1998).[4]

The text of 42 U.S.C. § 1985 is divided into three subsections. The first deals with conspiracies to prevent a federal officer from performing his or her duties. The second section deals with conspiracies to obstruct justice by intimidating a party, witness, or juror. The third section deals with conspiracies to deprive persons of the equal protection of the laws, or of equal privileges and

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[2] Other Circuit Courts have stated in dicta that the statute does apply to nonparty witnesses. *See Kimble v. McDuffy*, 648 F.2d 340, 348 (5th Cir. 1981) (Section 1985(2) "was intended to protect against direct violations of a party *or witness's right* to attend or testify in federal court.")

[3] *Hoopes v. Nacrelli*, 512 F.Supp. 363, 368 (E.D.Pa. 1981); *Kelly v. Foreman*, 384 F.Supp. 1352, 1353 (S.D.Tex. 1974); *Crawford v. City of Houston*, 386 F.Supp. 187, 192 (S.D.Tex. 1974).

[4] "We express no opinion regarding respondents' argument that intimidation claims under Section 1985(2) are limited to conduct involving force or threat of force, or their argument that only litigants and not witnesses, may bring Section 1985(2) claims. We leave those issues for the courts below to resolve on remand."

immunities under the law. Blankenship sought to bring suit under subsection (2) which explicitly provides, in two separate places, that it applies to conspiracies directed against "any party or witness" who has attended or testified in any court of the United States. The Ninth Circuit, however, relying on the phrase "the party so injured or deprived" contained in subsection (3), has construed the statute as conferring a cause of action only upon a witness who is also a party to the matter being heard in the court.

This construction flies in the face of the statutory text. First, the statute refers to "the party so injured or deprived"; *not* to "the party to the suit." Second, the remedial section encompasses remedies for several types of conspiracies that have nothing at all to do with litigation or court cases, such as conspiracies to interfere with voting. *See, e.g., Paynes v. Lee*, 377 F.2d 61 (1967) (African-American man had § 1985 cause of action against white man for interfering with his attempt to register to vote notwithstanding fact that plaintiff was neither a litigant nor a witness in any case). Third, subsection (2) explicitly refers to "any party *or* witness in any court of the United States," instead of referring to any "party witness" or to "any party who is a witness." Fourth, the Ninth Circuit's construction contradicts the directive of this Court that Reconstruction civil rights acts are to be construed broadly. *Griffin v. Breckenridge*, 403 U.S. 88, 97, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971).

In rejecting the approach taken by the Ninth Circuit, the Tenth Circuit held that it is clear from statutory language that nonparty witnesses are provided a remedy by the statute:

> Although defendants contend that plaintiff does not have standing to assert a Section 1985(2) claim because she was not a party in the Sweeny case, we do not agree. We have noted that Section 1985(2) creates four distinct causes of action, one of which is for conspiring "to injure such party or witness [who has testified in any court of the United States] in his person or property on account of his having so attended or testified.

Langley v. Adams County, 987 F.2d at 1481. Later in *Brever v. Rockwell International*, 40 F.3d at 1125, n.7 the Tenth Circuit reaffirmed its interpretation of the statute as including nonparty witnesses:

> Defendants suggest that the remedial portion of the statute located in section 1985(2) limits standing to parties only. The language relied on by defendants provides that "in any case of conspiracy set forth in [section 1985] . . . the party so injured or deprived may have an action for the recovery of damages . . . against any one or more of the conspirators." 42 U.S.C. § 1985(3) (emphasis added). Unlike defendants, we do not read the word "party" so literally as to mean "named party to an action," especially where the preceding portion of the same statute specifically identifies witnesses as protected persons. Moreover, defendants' suggested limitation on standing would effectively emasculate section 1985(2) in the context of this case. Here, we have a federal grand jury proceeding where the only "party," according to defendants' interpretation of the statute, would be the United States. We disagree with such a narrow reading, and *to the extent that defendants cite cases to the contrary we hold otherwise.*

(Italics added).

B. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *KUSH v. RUTLEDGE*.

The Ninth Circuit's construction of the statute is also inconsistent with this Court's decision in *Kush v. Rutledge*, 460 U.S. 719, 103 S.Ct. 1483, 75 L.Ed.2d 413 (1983), and with the statutory history of § 1985. In *Kush* this Court traced the legislative history of the statute, noting that it "was originally enacted as § 2 of the Civil Rights Act of 1871, 17 Stat. 13." *Id.* at 724. Three years later the statute was recodified. "When Congress passed legislation in 1874 to consolidate and collect all federal statutes and laws in the Revised Statutes, 18 Stat. 113, it expressed no intention to change the meaning of the laws, although minor changes in language were made to accommodate the consolidation." *Id.* at 724, n.6. As originally enacted in the Ku Klux Klan Act of 1871, the remedial portion of the statute conferred the right to bring suit for damages upon "the person so injured or deprived" by the wrongful conduct of the conspirators. 17 Stat. 13 (1871). Under *Kush* the changing of the word "person" to "party" was done "with no intention to change the meaning of the laws." *Id.* Therefore, the phrase "the party so injured or deprived" should be construed as meaning the same thing as the phrase "the person so injured or deprived." Since nonparty witnesses are "persons," under *Kush* they do have a cause of action under Section 1985 whenever they are "injured" for having attended or testified in a court of the United States.[5]

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[5] Blankenship also has standing to sue under Section 1985(2) for deprivation of her First Amendment right to

Finally, although this Court's decision in *Kush* did not directly address the issue of whether nonparty witnesses could bring an action under § 1985, the language at the end of the opinion regarding the purpose of the statute indicates that this Court assumed that they could:

> Protection of the processes of the federal courts was an essential component of Congress' solution to disorder and anarchy in the southern States. Neither proponents or opponents of the bill had any doubt that the Constitution gave Congress the power to prohibit intimidation of parties, *witnesses*, and jurors in federal courts.

Kush, 460 U.S. at 727 (italics added).

C. THE CASE PRESENTS AN IMPORTANT ISSUE OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

Whether nonparty witnesses who are injured on account of their having testified in a federal court have a cause of action under 42 U.S.C. § 1985 is an important federal question. The statute was originally enacted to prevent interference with the administration of justice in federal courts. At present in the Seventh and Ninth Circuits, nonparty witnesses can be harmed in retaliation for

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freedom of speech since the statute also provides a remedy for conspiracies to injure "any person" on account of their "having and exercising any right or privilege of a citizen of the United States." It is well settled that the "First Amendment protects the right to testify truthfully." *Melton v. City of Oklahoma City*, 879 F.2d 706, 714 (10th Cir. 1989) (*Melton I*), *overruled in part on rehearing en banc*, 928 F.2d 920 (10th Cir.) (*Melton II*), *cert. denied*, 12 S.Ct. 296 (1991).

their having obeyed a subpoena to appear and testify in a federal court, and they will have no remedy for their injury. But in the Tenth Circuit they will have a remedy. In other Circuits, the issue is unresolved, and the District Courts are without Circuit Court authority to instruct them as to how to resolve the issue. To date all published District Court decisions on the issue have rejected the Ninth Circuit's position.

This Court granted certiorari in *Kush* in order to resolve similar issues of statutory construction regarding Section 1985. 460 U.S. at 723. Because this case meets the criteria of Supreme Court Rule 10(a) and 10(c), this Court should grant certiorari in this case to resolve this important issue of statutory construction.

D. THE NINTH CIRCUIT'S HOLDING THAT JUDICIAL BRANCH EMPLOYEES MAY NOT BRING *BIVENS* ACTIONS FOR UNCONSTITUTIONAL JOB DISCRIMINATION CONFLICTS WITH DECISIONS OF THE SIXTH AND EIGHTH CIRCUITS.

The Ninth Circuit's decision that Blankenship may not bring a *Bivens* action because she has a "less than complete" remedy in the form of an EEO grievance combined with the Back Pay Act, is in direct conflict with the Eighth Circuit's decision in *Duffy v. Wolle*, 123 F.3d 1026 (8th Cir. 1997). *Duffy* specifically rejected the contention that Congress' delegation of power to the Judicial Conference, and the Judicial Conference's adoption of EEO plans on a Circuit by Circuit basis, could be read as demonstrating a Congressional intent to limit judicial employees to whatever remedies were provided for in

those EEO plans. Finding that such a delegation of legislative power would "almost certainly [be] a violation of the separation of powers doctrine," the Eighth Circuit *rejected* the argument that an EEO plan providing for administrative remedies for discrimination or retaliation claims was sufficient proof that Congress intended to preclude the bringing of *Bivens* actions by a judicial branch employee. *Duffy*, 123 F.3d at 1034-1035. A District Court in California has also rejected the same argument. *Garcia v. Williams*, 704 F.Supp. 985, 990 (N.D.Cal. 1988).[6]

The Sixth Circuit, like the Eighth, has also permitted judicial branch employees to bring *Bivens* actions. In *Guercio v. Brody*, 814 F.2d 1115 (6th Cir. 1987) the Court reversed a District Court decision which had dismissed a *Bivens* action brought by a bankruptcy judge's personal secretary against the Honorable George Brody, Judge of the United States Bankruptcy Court. Guercio's *Bivens* action, like Blankenship's, was also based on the contention that she had been retaliated against in violation of her First Amendment free speech rights. Guercio, like Blankenship, contended that she had "played a central role in exposing corruption" in the federal court. *Guercio*, 814 F.2d at 1116.

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[6] "While Congress did create the Judicial Conference, which in turn mandated that each judicial district implement an EEO plan, this activity is not remotely comparable to the legislative activity apparent in *Bush* and *Schweiker*. Consequently I do not find that a *Bivens* action should be precluded on the basis that Congress has given careful attention to judiciary personnel or on the basis that Congress has provided what it considers adequate remedies."

E. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *DAVIS v. PASSMAN* THAT FAILURE TO INCLUDE A CLASS OF EMPLOYEES WITHIN THE SCOPE OF A STATUTE DOES NOT DEMONSTRATE THAT CONGRESS INTENDED TO PRECLUDE A *BIVENS* ACTION.

If the Eighth Circuit is correct in holding that Congress did not intend for EEO grievance plan procedures to preclude *Bivens* remedies, then the only remaining argument in support of the conclusion that Congress intended to preclude judicial branch employees from bringing *Bivens* actions rests on the Civil Service Reform Act. Relying on the Eleventh Circuit's decision in *Lee v. Hughes*, 145 F.3d 1272 (11th Cir. 1998), defendants McDonald and Larsen contended that Congress' failure to give judicial branch employees any statutory right to judicial review of adverse personnel decisions under the CSRA demonstrates that Congress intended that such employees should not be able to bring any *Bivens* action either.

The extent to which the Ninth Circuit relied upon this argument is unclear. On the one hand, the Ninth Circuit cited *Hughes* in support of the proposition that Congress' action "in providing certain remedies and denying others to judicial employees" was not inadvertent. *Blankenship*, 176 F.3d at 1195, citing to *Hughes*, 145 F.3d at 1275. But the *Hughes* decision of the Eleventh Circuit does not recognize the existence of any Congressionally provided remedies for judicial branch employees. On the contrary, the Eleventh Circuit candidly acknowledged that by excluding judicial branch

employees from the class of employees entitled to obtain administrative or judicial review of adverse personnel actions, Congress had left them with no remedies whatsoever. The Eleventh Circuit expressly stated that it found it "troubling" that Congress left judicial branch employees with absolutely no remedy for unconstitutional job discrimination.[7] Thus it makes no sense for the Ninth Circuit to cite *Hughes* as support for the proposition that "less than complete" remedies were intentionally provided, when *Hughes* expressly holds that Congress provided no remedies at all. Although the District Court in this case considered the combination of the EEO Plan and the Back Pay Act to be an adequate albeit "less than complete" remedy for judicial branch employees, the Eleventh Circuit specifically eschewed this rationale. The *Hughes* Court recognized that the Eighth Circuit had rejected the EEO Plan/Back Pay Act theory in *Duffy v. Wolle, supra,* and declined to address this theory at all. *Hughes,* 145 F.3d at 1276, n.4. Instead, the Eleventh Circuit expressly held that Congress intended for judicial branch employees to have no remedy at all, and that Congress' intent was therefore to also preclude *Bivens* actions as well. Thus the Ninth Circuit's rationale conflicts with the Eleventh Circuit's rationale, as

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[7] *Hughes* explicitly recognizes that the CSRA does not provide judicial branch employees with judicial or administrative review of adverse personnel decisions. *Hughes,* 145 F.3d at 1275. The Eleventh Circuit noted that the case before "is troubling because plaintiff was not afforded a congressionally enacted judicial or administrative procedure through which to vindicate the alleged constitutional wrong." *Id.* at 1276.

well as with the rationale and the result reached by the Eighth Circuit in *Duffy v. Wolle, supra.*

Moreover, even assuming that the Ninth Circuit meant to adopt the Eleventh Circuit's contention that omission of any statutory remedy for a class of employees is to be read as indicative of a Congressional intent to preclude a *Bivens* action, that conclusion is directly contrary to this Court's decision in *Davis v. Passman,* 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979). It was undisputed in *Davis* that Congress left Congressional employees with absolutely no statutory remedies against gender discrimination. And yet this Court rejected the contention that this meant that Congress intended to preclude *Bivens* actions by Congressional employees against Congressmen:

> [T]here is in this case "no explicit congressional declaration that persons" in petitioner's position injured by unconstitutional federal employment discrimination "may not recover damages from" those responsible for the injury. *Bivens, supra,* 403 U.S., at 397, 91 S.Ct., at 2005 . . . When § 717 was added to Title VII to protect federal employees from discrimination, it failed to extend this protection to congressional employees such as petitioner who are not in the competitive service. [Footnote omitted]. There is no evidence, however, that Congress meant § 717 to foreclose alternative remedies to those not covered by the statute. Such silence is far from "the clearly discernible will of Congress" perceived by the Court of Appeals . . . [W]e do not interpret § 717 to foreclose the judicial remedies of those expressly unprotected by the

> statute. On the contrary, § 717 leaves undisturbed whatever remedies petitioner might otherwise possess.

Davis, 442 U.S. at 246-247.

F. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS IN *DAVIS v. PASSMAN* AND *BIVENS v. SIX UNKNOWN AGENTS* THAT LITIGANTS WHO ALLEGE THAT THEIR CONSTITUTIONAL RIGHTS HAVE BEEN VIOLATED AND WHO HAVE NO EFFECTIVE MEANS OTHER THAN THE JUDICIARY TO ENFORCE THESE RIGHTS, MUST BE ABLE TO ENFORCE THESE RIGHTS THROUGH A *BIVENS* ACTION.

In *Davis* this Court held that in the absence of a textually demonstrable commitment of an issue to another branch of government, it is presumed that justiciable constitutional rights are to be enforced through the courts. *Id.* at 243. "[U]nless such rights are to become merely precatory, the class of litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights." *Id.* at 242.

In subsequent cases this Court has contrasted the position of those that have some significant remedies that may afford less than complete redress for their injuries, with those that have no statutory remedies whatsoever. For example, *Bush v. Lucas*, 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983) involved an executive branch

employee who exercised his statutory right to seek administrative review of his demotion. The employee won reinstatement and an award of $30,000 in back pay from the Civil Service Commission Review Board. And in *United States v. Fausto*, 484 U.S. 439, 108 S.Ct. 668, 98 L.Ed.2d 830 (1988) a Fish and Wildlife Service employee filed a grievance challenging his termination before an independent grievance examiner, and won reinstatement and an award of back pay. Thus both Fausto and Bush had significant meaningful statutory remedies, and both were able to use them to challenge the adverse employment decisions made against them.

The plaintiffs in *Davis* and *Bivens*, however, had no statutory remedies at all. Their only means of obtaining a remedy was to recognize an implied damages remedy directly from the Constitution itself. As this Court noted in *Bush*, "For Davis, as for Bivens, 'it is damages or nothing.' " *Bush*, 462 U.S. at 245, quoting *Bivens*, 403 U.S. at 410. In this respect, Blankenship is in the same position as the plaintiffs in *Davis* and in *Bivens*. As a judicial branch employee Blankenship has no statutory right under the CSRA to obtain review of an adverse personnel action.[8] The ability to file an EEO grievance is hardly an

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[8] In 5 U.S.C. § 2302 the CSRA contains wide ranging prohibitions against several "prohibited personnel practices." But the Act is limited to Executive branch employees. A "personnel action" is defined as an action taken "with respect to an employee in, or applicant for, a covered position *in an agency* . . . ." 5 U.S.C. § 2302(a)(2)(A). And although the term "covered position" does include a person with "a position in the excepted service," the Act states that the term " 'agency' means *an Executive agency and the Government Printing Office* . . . ." 5

adequate remedy in a case like this one where the EEO complaint will be handled by the Clerk who conspired to demote her and then recommended that she be fired, the Chief Judge who promised no retaliation due to her testimony but who signed the order firing her, and ultimately by the district court *en banc*, including the Chief Judge and Judge McDonald, in upholding her termination. Thus Blankenship's only possible constitutionally adequate remedy is a *Bivens* action. The Ninth Circuit's decision that she cannot bring a *Bivens* action thus conflicts with this Court's decisions in *Davis* and *Bivens*.

G. THIS CASE PRESENTS THE CONSTITUTIONAL ISSUE WHICH THIS COURT RESERVED IN *BUSH v. LUCAS*: "DOES THE CONSTITUTION ITSELF REQUIRE A JUDICIALLY FASHIONED DAMAGES REMEDY IN THE ABSENCE OF ANY OTHER REMEDY TO VINDICATE THE UNDERLYING RIGHT?"

The decision below presents the constitutional issue which this Court reserved in *Bush*. There this Court observed that since the plaintiff was afforded some meaningful remedies under the CSRA, "[w]e need not reach the question whether the Constitution itself requires a judicially fashioned damages remedy in the absence of any other remedy to vindicate the underlying right." *Bush*, 462 U.S. at 378, n.14.

U.S.C. § 2302(a)(2)(C). Thus the CSRA affords employees of the Judicial Branch no remedies at all against adverse personnel actions.

In the present case the Ninth Circuit's citation to *Hughes* appears to endorse the Eleventh Circuit's holding that by enacting the CSRA Congress intentionally deprived judicial branch employees of any means of remedying any violation of any of their constitutional rights, and deliberately meant to preclude them from bringing any *Bivens* action. Even assuming that were true, the question would remain whether it is constitutional for Congress to preclude a *Bivens* action when it fails to provide any other meaningful remedy. In *Bush* this Court noted, "The existing civil service remedies for a demotion in retaliation for protected speech are clearly constitutionally adequate." *Bush*, 462 U.S. at 378, n.14. The present case raises the issue of whether a judicial branch employee has a "constitutionally adequate" remedy for being fired for testifying truthfully at another employee's EEO grievance hearing, when her only conceivable remedy is to present an EEO grievance to one of the federal judges who signed the order firing her, and who personally reassured her before she testified that her testimony would remain confidential and that she need not fear that her testimony would lead to retaliation.[9]

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[9] It is well settled that one of the minimum requirements of procedural due process is an impartial decisionmaker. *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). In the present case, had Blankenship filed an EEO grievance regarding her termination, her grievance would have been processed by the Clerk of the Court, who is in her case one of the defendants in this case, and it would have been heard by the Chief Judge of the District Court, who signed the order which fired her. Thus it cannot plausibly be argued that the availability of an EEO grievance procedure constituted a "constitutionally adequate" remedy for the violation of Blankenship's First Amendment rights.

In *Bush*, Justices Marshall and Blackmun observed, in their concurring opinion, "there is nothing in today's decision to foreclose a federal employee from pursuing a Bivens remedy where his injury is not attributable to personnel actions which may be remedied under the federal statutory scheme." *Bush*, at 391 (Marshall, J., concurring). They emphasized that "a different case would be presented if Congress had not created a remedy that was specifically designed to provide full compensation to civil service employees who are discharged or disciplined in violation of their First Amendment rights." *Id.* at 390. But the present case presents exactly that scenario, because under the CSRA judicial branch employees do not have any remedy against discharge in violation of their First Amendment rights.

In *Bush* this Court noted, "The question is not what remedy the court should provide for a violation that would otherwise go unredressed." *Bush*, 462 U.S. at 388. But in the present case that is the question. The violation of Blankenship's First Amendment rights will go unredressed unless this Court holds that the Ninth Circuit erred in holding that Congress deliberately precluded all judicial branch employees from bringing *Bivens* actions.

State government employees, including state judicial branch employees, can bring damages actions for the deprivation of their constitutional rights under 42 U.S.C. Section 1983. *See, e.g., Forrester v. White*, 484 U.S. 219, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988). Federal employees of the executive branch can obtain meaningful redress for unconstitutional job discrimination under the Civil Service Reform Act. Congressional employees can bring *Bivens* actions. But according to the Ninth Circuit,

employees of the federal judiciary have no remedy at all. There is no plausible justification for isolating employees of the federal judiciary as the only class of government employees in the country who cannot vindicate the violation of the First Amendment right to speak truthfully without being fired for having done so.

CONCLUSION

For the reasons stated above, this petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit should be granted.

DATED this 8th day of October 1999.

JAMES E. LOBSENZ
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VICTORIA VREELAND
Attorneys for Petitioner

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Kathryn I. BLANKENSHIP, Plaintiff-Appellant,

v.

The Honorable Alan A. McDONALD, United States District Court Judge, Eastern District of Washington, personally and the marital community composed of Alan A. McDonald and Ruby K. McDonald; James R. Larsen, Clerk, United States District Court, Eastern District Of Washington, personally, and the marital community composed of James R. Larsen and L. Dianne Emmons, Defendants-Appellees.

No. 97-35898.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Dec. 10, 1998.

Filed May 14, 1999.

Appeal from the United States District Court for the Eastern District of Washington; Owen M. Panner, District Judge, Presiding. D.C. No. CV-97-03019-OMP.

Before: REAVLEY,[1] LEAVY and McKEOWN, Circuit Judges.

LEAVY, Circuit Judge:

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[1] The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the United States Court of Appeals, Fifth Circuit, sitting by designation.

This case requires us to decide whether a federal court reporter who has no effective remedies under the Civil Service Reform Act ("CSRA)[2] has an action for money damages, commonly called a *Bivens* action,[3] for alleged constitutional violations in the workplace. The plaintiff, Kathryn Blankenship, appeals the district court's judgment of dismissal. We have jurisdiction pursuant to 28 U.S.C. Section 1291 and we affirm.

I.

Blankenship filed this action against the defendants, District Court Judge Alan A. McDonald and Court Clerk James Larsen, in their individual capacities. The allegations in the complaint are considered true and for purposes of the motion to dismiss and may be summarized as follows:

Blankenship was appointed in 1985 as a court reporter for the United States District Court for the Eastern District of Washington. From 1985 to 1990, she worked in Spokane, Washington, and in 1990, she was transferred to Yakima, Washington in the same district. She worked throughout her employment as the official court reporter for Judge McDonald. James Larsen supervised the court reporters in Spokane and Yakima.

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[2] The CSRA is codified and amended in various sections of Title 5, United States Code.

[3] A "*Bivens*" action is the commonly used phrase describing a judicially created remedy for unconstitutional conduct by federal officials. This constitutional tort theory was set out in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

In July 1994, Blankenship was subpoenaed to testify in a former employee's hearing pursuant to a complaint filed under the court's Equal Employment Opportunity ("EEO") plan. Blankenship testified about events and conduct in the Yakima courthouse, particularly involving the conduct of Judge McDonald's in-court clerk, which included the abuse of personnel rules, use of court facilities for private business, regular and excessive profanity, and sexist and racist jokes and comments. She also testified that Judge McDonald reviewed her official transcripts prior to filing, edited and deleted words, required her to change the reports of proceedings, and would not allow her to certify the reports "as amended." She testified that Judge McDonald and his in-court clerk often passed notes which included comments about a litigant, witness, or attorney that were disrespectful and rude.

Immediately following the hearing, James Larsen was observed talking with Judge McDonald outside the courthouse. The next working day, Judge McDonald confronted Blankenship and demanded to know why she had "aired the court's dirty laundry."

James Larsen met Blankenship outside the courthouse and told her that she had three options: (1) to take a voluntary transfer to Spokane to be part of a pool of court reporters; (2) to take permanent medical disability; or (3) to be terminated for poor performance due to delay in filing a recent transcript. Blankenship exercised none of these options. James Larsen then scheduled a performance review for November 10, 1994. Blankenship did not attend the review and sent a letter to Larsen protesting the review, stating that she should not be punished for bringing judicial improprieties to the court's attention.

In November 1994, Larsen sent a written "performance report" to Blankenship by mail, principally citing Blankenship's failure to meet certain filing deadlines. In December 1994, Larsen wrote Blankenship that she would be transferred to Spokane effective February 1, 1995. Blankenship refused to be transferred to Spokane. On February 1, 1995, Larsen wrote to Blankenship that he planned to recommend her termination. Blankenship responded in writing that the stated reasons for the proposed termination were pretextual. By letter dated February 13, 1995, signed by the four ten-active district court judges, Blankenship was officially terminated by the court effective March 3, 1995.

In her complaint, filed in February 1997, Blankenship alleged that defendants violated her first and fifth amendment rights, and that these violations caused her injuries for which she should receive money damages. The district court dismissed the complaint for failure to state a claim upon which relief could be granted.

II.

Blankenship, as an appointed judicial employee, is a member of the "excepted service" under the CSRA.[4] Blankenship argues that because she has no administrative or

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[4] "Civil service" consists of all appointive positions, including those in the judicial branch, 5 U.S.C. Section 2101; court reporters are appointed under 28 U.S.C. Section 753(a); "civil service" includes those in "excepted service" under 5 U.S.C. Section 2103, which includes everyone who is not in the two other categories of civil service.

judicial remedies under the CSRA as a member of the excepted service, she is entitled to assert a *Bivens* claim.

In *Bivens*, the Supreme Court held that a plaintiff could state a claim and recover money damages against federal officials for constitutional violations where there are no "special factors counseling hesitation in the absence of affirmative action by Congress." 403 U.S. at 396-97, 91 S.Ct. 1999. "When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration," the Supreme Court has not created additional *Bivens* remedies. *Schweiker v. Chilicky*, 487 U.S. 412, 423, 108 S.Ct. 2460, 101 L.Ed.2d 370 (1988). Accordingly, we have declined to create a *Bivens* remedy if there are "indications that congressional action has not been inadvertent." *Moore v. Glickman*, 113 F.3d 988, 993 (9th Cir. 1997) (quoting *Chilicky*, 487 U.S. at 423, 108 S.Ct. 2460).

The CSRA contains an "elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations . . . " *Bush v. Lucas*, 462 U.S. 367, 388, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983). In *Saul v. United States*, 928 F.2d 829, 840 (9th Cir. 1991), we stated:

> "The CSRA's comprehensive remedial provisions convince us that there was no inadvertence in omitting a damages remedy against supervisors whose work-related actions allegedly violate a subordinate's constitutional rights. In the area of federal employment, congress is better equipped than we to strike an

> appropriate balance between employees' interests in remedying constitutional violations and the interests of the government and the public in maintaining the efficiency, morale and discipline of the federal workforce."

Because congressional action has not been inadvertent in providing certain remedies and denying others to judicial employees, we hold that the CSRA precludes a *Bivens* remedy in this case. Accord *Lee v. Hughes*, 145 F.3d 1272, 1275 (11th Cir. 1998). Congress has given judicial employees certain employment benefits and remedies, such as back pay, severance pay, family and medical leave, and health and retirement benefits. Congress has withheld other benefits and remedies, such as review of adverse personnel decisions. This demonstrates that the lack of more complete remedies was not inadvertent. *See Moore*, 113 F.3d at 992; *Kotarski v. Cooper*, 866 F.2d 311, 312 (9th Cir. 1989).

III.

Blankenship's complaint also alleged state tort claims for intentional infliction of emotional distress. Blankenship's state claims are preempted by the CSRA. Preemption is necessary because "[b]oth the CSRA and its legislative history show that congress did not intend that state tort law operate within the interstices of the act." *Saul v. United States*, 928 F.2d at 842; accord *David v. United States*, 820 F.2d 1038, 1043 (9th Cir. 1987).

Blankenship also alleged a claim under 42 U.S.C. Section 1985(2) which prohibits conspiracies "to deter, by force, intimidation, or threat, any party or witness in any

court of the United States . . . from testifying to any matter pending therein, freely, fully and truthfully." Blankenship claimed that the defendants conspired to retaliate against her for giving testimony in the EEO hearing of a fellow employee.

We have previously held that "[a]llegations of witness intimidation under Section 1985(2) will not suffice for a cause of action unless it can be shown the litigant was hampered in being able to present an effective case." *David v. United States*, 820 F.2d at 1040. Because Blankenship was not a party to the EEO proceeding, she can show no injury under section 1985(2). *Id.*; accord *Rutledge v. Arizona Board of Regents*, 859 F.2d 732, 735 (9th Cir. 1988) (even if potential witness to plaintiff's federal action were intimidated, such intimidation had no effect on plaintiff's ability to present a case in federal court).

The judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Kathryn I. BLANKENSHIP, Plaintiff-Appellant,

v.

The Honorable Alan A. McDONALD, United States District Court Judge, Eastern District of Washington, personally, and the marital community composed of Alan A. McDonald and Ruby K. McDonald; James R. Larsen, Clerk, United States District Court, Eastern District of Washington, personally, and the marital community composed of James R. Larsen and Dianne Emmons, Defendants-Appellees.

No. 97-35898.

DC# CV-97-03019-OMP
Eastern District of Washington (Yakima)

ORDER

(Filed July 22, 1999)

Before: REAVLEY,[5] LEAVY and McKEOWN, Circuit Judges.

Judge McKeown has voted to deny appellant's petition for rehearing and to deny the petition for rehearing en banc. Judges Reavley and Leavy have voted to deny the petition for rehearing and recommend denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a

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[5] The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the United States Court of Appeals, Fifth Circuit, sitting by designation.

vote on whether to rehear the matter en banc. Fed.R.App.P. 35.

The petition for rehearing and petition for rehearing en banc are denied.